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8 UNITED STATES DISTRICT COURTS
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 Fraser Rotchford,

11 Plaintiff,

12 v.

13 Richard Davies et al.,

14 Defendants.

CASE NO. 3:19-cv-05154-RBL-JRC

ORDER TO SHOW CAUSE OR
AMEND COMPLAINT

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16 Plaintiff Fraser Rotchford, proceeding *pro se* and *in forma pauperis*, filed this civil rights
17 complaint under 42 U.S.C. § 1983. Plaintiff's claims against his defense counsel are barred under
18 *Heck v. Humphrey*, 512 U.S. 477 (1994), unless plaintiff can show his convictions were
19 overturned through the appeals process or a habeas corpus petition. Plaintiff's allegations that
20 defendants Dempsey, Charlton, Davies, and Jacobs verbally harassed and threatened him and
21 that he had a consensual sexual relationship with defendant Moore are not sufficient to
22 demonstrate a violation of the Eighth Amendment. Accordingly, the Court declines to serve
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1 plaintiff's complaint, however, the Court provides plaintiff leave to file an amended pleading by
2 May 24, 2019, to cure the deficiencies identified herein.

3 BACKGROUND

4 In his plaintiff, who is currently housed at Clallam County Jail, names as defendants
5 Richard Davies, Jack Range, Jefferson County Associated Counsel ("JCAC"), Jennifer
6 Dempsey, Scott Charlton, Nat Jacobs, and Ashley Moore. Dkt. 8 at 2. Plaintiff alleges that
7 defendants Davies, Dempsey, JCAC, Charlton, Range, and Jacobs failed to inform plaintiff of his
8 ability to appeal a plea bargain, failed to inform plaintiff that he was required to be at pre-trial
9 hearings, refused to provide plaintiff with discovery, and filed an appeal against his wishes. *Id.* at
10 3-12.

11 Plaintiff alleges that defendant Dempsey repeatedly asked for his phone number, which
12 he alleges constituted sexual harassment. *Id.* at 3-6. Plaintiff alleges that defendants Davies,
13 Charlton, and Jacobs threatened him with physical violence. *Id.* at 4. Plaintiff alleges that he had
14 a consensual sexual relationship with defendant Moore, a deputy at Jefferson County Sheriff's
15 Department. *Id.* at 7.

16 Plaintiff seeks \$16 million dollars for "application of mens rea as criterion for
17 determination of relief instead of proof beyond a reasonable doubt of damages(s)[.]" *Id.* at 14.

18 DISCUSSION

19 Under the Prison Litigation Reform Act of 1995 ("PLRA"), the Court is required to
20 screen complaints brought by prisoners seeking relief against a governmental entity or officer or
21 employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must "dismiss the
22 complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to
23 state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant
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1 who is immune from such relief.” *Id.* at (b); 28 U.S.C. § 1915(e)(2); *see Barren v. Harrington*,
2 152 F.3d 1193 (9th Cir. 1998).

3 In order to state a claim for relief under 42 U.S.C. § 1983, a plaintiff must sufficiently
4 allege that: (1) he suffered a violation of rights protected by the Constitution or created by
5 federal statute, and (2) the violation was proximately caused by a person acting under color of
6 state law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The first step in a § 1983
7 claim is therefore to identify the specific constitutional right allegedly infringed. *Albright v.*
8 *Oliver*, 510 U.S. 266, 271 (1994). To satisfy the second step, a plaintiff must allege facts
9 showing how individually named defendants caused, or personally participated in causing, the
10 harm alleged in the complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

11 Plaintiff’s complaint does not sufficiently allege these claims, which will result in
12 dismissal of his case if not corrected in an amended complaint.

13 I. *Heck* Bar and Defense Counsel as Defendants

14 Plaintiff’s allegations that defendants Davies, Dempsey, Charlton, Range, and Jacobs
15 failed to inform plaintiff of his ability to appeal a plea bargain, failed to inform plaintiff that he
16 was required to be at pre-trial hearings, refused to provide plaintiff with discovery, and filed an
17 appeal against his wishes, raise a direct challenge to plaintiff’s prior criminal convictions. *Id.* at
18 3-12.

19 When a prisoner confined by the government challenges the very fact or duration of his
20 physical imprisonment, and the relief he seeks will determine that he is or was entitled to
21 immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ
22 of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). In order to recover damages
23 for an alleged unconstitutional conviction or imprisonment, or for other harm caused by actions
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1 whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove
2 that the conviction or sentence has been reversed on direct appeal, expunged by executive order,
3 declared invalid by a state tribunal authorized to make such determination, or called into
4 question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. *Heck*, 512
5 U.S. at 486-87.

6 Here, plaintiff does not allege that his prior criminal convictions have been reversed on
7 direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to
8 make such a determination, or called into question by a writ of habeas corpus. *See* Dkt. 8. Rather,
9 plaintiff's allegations indicate that he was "wrongfully accused of stalking" and "violating a
10 protection order" *Id.* at 5. Thus, plaintiff's claims against defendants Davies, JCAC, Charlton,
11 Range, Jacobs and Dempsey are barred under *Heck* unless plaintiff can show his convictions
12 were overturned through the appeals process or a habeas corpus petition. *See Heck*, 512 U.S. at
13 486-87.

14 Moreover, even if plaintiff's claims are not barred under the *Heck* doctrine, plaintiff has
15 not alleged that defendants Davies, JCAC, Charlton, Range, Jacobs and Dempsey were acting
16 under color of state law when they defended plaintiff in his prior criminal cases.

17 To state a claim under § 1983, a plaintiff must allege: (1) the deprivation of right,
18 privileges, or immunities secured by the Constitution; (2) by a person acting under the color of
19 state law. *West v. Atkins*, 487 U.S. 42, 48-49 (1988). A person acts under color of state law when
20 he or she "exercises power possessed by virtue of state law and made possible only because the
21 wrongdoer is clothed with the authority of state law." *Id.* at 49. "The purpose of § 1983 is to
22 deter state actors from using the badge of their authority depriving individuals of their federally
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1 guaranteed rights.” *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000) (citing *Wyatt v. Cole*,
2 504 U.S. 158, 161 (1992)).

3 However, the Supreme Court has repeatedly recognized that public defenders are not
4 acting under color of state law for purposes of § 1983 when they act in their traditional role as an
5 advocate. *See, e.g., Vermont v. Brillon*, 556 U.S. 81, 91 (2009) (assigned public defender is
6 ordinarily not considered a state actor); *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Polk*
7 *C’nty v. Dodson*, 454 U.S. 312, 320-25 (1981) (a public defendant “does not act under color of
8 state law when performing a lawyer’s traditional functions as counsel” to a criminal defendant).
9 Public defenders and private criminal defense attorneys do not act under the color of law when
10 representing criminal defendants because they are not acting on behalf of the government; rather,
11 they are the government’s adversary. *See Polk C’nty*, 454 U.S. at 323 n.13; *see also Atkins*, 487
12 U.S. at 50.

13 Thus, plaintiff must show cause as to why these claims should not be dismissed.

14 II. Verbal Threats

15 Plaintiff alleges that defendants Dempsey, Charlton, Davies, and Jacobs verbally
16 harassed and threatened him. Dkt. 8 at 3-6. First, as noted above, it is not clear that defendants
17 Dempsey, Charlton, Davies and Jacobs were acting under the color of state law when the
18 allegedly verbally harassed plaintiff. Moreover, “verbal harassment generally does not violate
19 the Eighth Amendment.” *Kennan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) (citing *Oltarzewski*
20 *v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987)). Thus, even if plaintiff had alleged facts
21 demonstrating that defendants Dempsey, Charlton, Davies, and Jacobs were acting under the
22 color of state law, plaintiff’s allegations of verbal harassment and threats are not sufficient to
23 demonstrate a violation of the Eighth Amendment.

1 Accordingly, plaintiff must show cause as to why these claims should not be dismissed.

2 III. Defendant Moore

3 Plaintiff alleges that he had a consensual sexual relationship with defendant Moore. Dkt.
4 8.

5 Sexual abuse in prison is viewed through the Eighth Amendment's ban on cruel and
6 unusual punishment. "Whether a particular event or condition in fact constitutes 'cruel and
7 unusual punishment' is gauged against 'the evolving standards of decency that mark the progress
8 of a maturing society.' " *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000) (quoting
9 *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)). In terms of excessive force, the Supreme Court has
10 held that when "prison officials maliciously and sadistically use force to cause harm,
11 contemporary standards of decency always are violated," regardless of whether a prisoner
12 suffered significant physical injury. *Hudson*, 503 U.S. at 9. The only requirement is that the
13 prison official's actions be " 'offensive to human dignity.' " *Schwenk*, 204 F.3d at 1196 (quoting
14 *Felix v. McCarthy*, 939 F.2d 699, 702 (9th Cir. 1991)). "A sexual assault on an inmate by a guard
15 ... is deeply 'offensive to human dignity.' " *Id.* at 1197.

16 However, numerous district courts have held that a consensual sexual relationship
17 between a prisoner and a correctional officer does not violate the Eighth Amendment. *See Fisher*
18 *v. Goord*, 981 F. Supp. 140, 174 (W.D. N.Y. 1997) (allegedly consensual sexual relationship
19 with prison guard did not violate Eighth Amendment); *Phillips v. Bird*, 2003 WL 22953175, at
20 *6 (D. Del. Dec. 1, 2003) ("Consensual sex between two adults does not constitute cruel and
21 unusual punishment simply because it occurs within the walls of a prison."); *Petty v. Venus*
22 *Correctional Unit*, 2001 WL 360868 at *2 (N.D. Tex. April 10, 2001) (dismissing inmate's §
23 1983 claim because "plaintiff has not shown the alleged [sexual] harassment to have caused him
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1 pain"). *See also Hudson*, 503 U.S. at 9 (not "every malevolent touch by a prison guard gives rise
2 to a federal cause of action.").

3 Here, plaintiff alleges his relationship with defendant Moore was consensual, and does
4 not allege that defendant Moore engaged in any sexual abuse or misconduct which would violate
5 the Eighth Amendment's ban on cruel and unusual punishment. Accordingly, plaintiff has not
6 sufficiently alleged facts supporting a claim under the Eighth Amendment against defendant
7 Moore. If plaintiff wishes to pursue claims under the Eighth Amendment against defendant
8 Moore, he must provide an amended complaint with a short, plain statement explaining exactly
9 what actions were taken by defendant Moore, how each defendant Moore's actions violated
10 plaintiff's constitutional rights, what harm he suffered as a result, and whether defendant Moore
11 had knowledge of plaintiff's harm or risk of harm.

12 IV. Instructions to Plaintiff and the Clerk

13 Due to the deficiencies described above, the Court will not serve plaintiff's complaint. If
14 plaintiff intends to pursue a § 1983 civil rights action in this Court, he must file an amended
15 complaint and within the amended complaint, he must write a short, plain statement telling the
16 Court: (1) the constitutional right plaintiff believes was violated; (2) the name or names of the
17 person or persons who violated the right; (3) exactly what each individual or entity did or failed
18 to do; (4) how the action or inaction of each individual or entity is connected to the violation of
19 plaintiff's constitutional rights; and (5) what specific injury plaintiff suffered because of the
20 individuals' conduct. *See Rizzo v. Goode*, 423 U.S. 362, 371–72, 377 (1976).

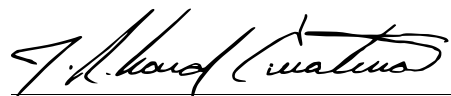
21 Plaintiff shall present the amended complaint on the form provided by the Court. The
22 amended complaint must be legibly rewritten or retyped in its entirety, it should be an original
23 and not a copy, it should contain the same case number, and it may not incorporate any part of
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1 the original complaint by reference. The amended complaint will act as a complete substitute for
2 the original complaint, and not as a supplement. An amended complaint supersedes all previous
3 complaints. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997) *overruled in part on*
4 *other grounds, Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012). Therefore, the
5 amended complaint must be complete in itself and all facts and causes of action alleged in the
6 original complaint that are not alleged in the amended complaint are waived. *Forsyth*, 114 F.3d
7 at 1474. The Court will screen the amended complaint to determine whether it contains factual
8 allegations linking each defendant to the alleged violations of plaintiff's rights. The Court will
9 not authorize service of the amended complaint on any defendant who is not specifically linked
10 to a violation of plaintiff's rights.

11 If plaintiff fails to file an amended complaint or fails to adequately address the issues
12 raised herein on or before May 24, 2019, the undersigned will recommend dismissal of this
13 action pursuant to 28 U.S.C. § 1915.

14 The Clerk is directed to send plaintiff the appropriate forms for filing a 42 U.S.C. § 1983
15 civil rights complaint. The Clerk is further directed to send copies of this Order and Pro Se
16 Instruction Sheet to plaintiff.

17 Dated this 25th day of April, 2019.

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21 J. Richard Creatura
22 United States Magistrate Judge
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